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# The Sovereign State Responsibility And The Human Rights Imperative Of Zero-Gas Emission In Niger-Delta: Rejigging The Imposed Legal Order For A Quick Climate Redress

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# THE SOVEREIGN STATE RESPONSIBILITY AND THE HUMAN RIGHTS IMPERATIVE OF ZERO-GAS EMISSION IN NIGER-DELTA: RE- JIGGING THE IMPOSED LEGAL ORDER FOR A QUICK CLIMATIC REDRESS

OGUNNAIKE OLUSEYI TAIWO\*

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## I. INTRODUCTION

As more of the sun's heat warms the earth, so even more ice caps are aimlessly set for a death spiral as Shell Petroleum Development Company of Nigeria (SPDC)<sup>1</sup> persists in synergistic warming of four and half billion years old earth.<sup>2</sup> As noted by Ben Ikari, Shell came to Nigeria with the British Government, and embarked on massive exploration and exploitation of African resources for the expansion of British empire.<sup>3</sup>

Although independent of colonial administration of the British government since 1960,<sup>4</sup> the sovereign state of Nigeria supports Shell in the exploration of oil and gas with its attendant gas emissions which has caused diverse depletion of the environment resulting inter-alia in global warming; and enabled it to by-pass existing Nigerian environmental legislation. However, since the

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1. See *SPDC - Shell Petroleum Development Company of Nigeria*, SHELL NIGERIA, <http://www.shell.com.ng/about-us/what-we-do/spdc.html> (last visited Jan. 4, 2017) (explaining that Shell Nigeria is the common name for Royal Dutch Shell's Nigerian Operations carried out through four subsidiaries – primarily Shell Petroleum Development Company of Nigeria (SPDC) – and finding that Shell accounts for more than 21% of Nigeria's total petroleum from more than eighty fields).

2. Nell Greenfieldboyce, *When Did Humans Start Shaping Earth's Fate? An Epoch Debate*, NPR (Apr. 6, 2015, 4:22 AM), <http://www.npr.org/2015/04/06/396905885/when-did-humans-start-shaping-earths-fate-an-epoch-debate>.

3. See Ben Wuloo Ikari, *The Contribution of Gas Flaring in Nigeria to Global Warming*, SYNTHESIS/REGENERATION 46 (2008), <http://www.greens.org/s-r/46/46-06.html> (acknowledging that the British colonial government invaded, fought, and conquered the already independent people who lived around the River Niger to engage in reckless exploitation of their resources and to expand their empire).

4. AKINTADE M. OLUFEMI & OGUNNAIKE O. TAIWO, INTRODUCTION TO CITIZENSHIP EDUCATION IN NIGERIA 45-48 (2011) (noting that the 1958 constitutional conference held in Lagos set the date for Nigeria's independence which occurred on October 1, 1960).

1990s, the Nigeria's Niger-Delta populations have been protesting to demand stoppage of gas flaring;<sup>5</sup> and the movement caught the attention of the international community in 1995<sup>6</sup> when the Nigerian government's attempts to contain the protest movement resulted in the execution of nine Ogonis.<sup>7</sup>

Afterwards, international bodies such as the United Nations (UN) in 1998 and the African Commission in 2001 carried out a series of investigations in the Niger-Delta;<sup>8</sup> the result of which led to a resolution that the Nigerian government and Shell should take action to remedy the environmental degradation caused.<sup>9</sup> But neither the Nigerian government nor Shell took action to remedy the situation.<sup>10</sup> Even though, the Nigerian government and Shell committed to complying with the recommendations of the Environmental Impact

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5. See Ike Okonta, *Remembering Ken Saro-Wiwa and the Struggle for Justice in Nigeria*, PAMBAZUKA NEWS (Oct. 13, 2005), <http://www.pambazuka.org/governance/remembering-ken-saro-wiwa-and-struggle-justice-nigeria> (describing how the Ogoni peoples of Niger-Delta protested environmental injustice and gas flaring perpetrated by Shell Oil Company on their land).

6. See Joshua Cooper, *The Ogoni Struggle for Human Rights and a Civil Society in Nigeria*, in NONVIOLENT SOCIAL MOVEMENTS 189 (Blackwell Publishers 1999); see also A. Igoni Barrett, 'We all Stand Before History', MAIL & GUARDIAN (Nov. 11, 2015), <http://mg.co.za/article/2015-11-11-we-all-stand-before-history/> (observing that in response to repeated arrests of Ken Saro-Wiwa, Greenpeace and Amnesty International led international campaign for his release).

7. See *The True 'Tragedy' Delays and Failures in Tackling Oil Spills in the Niger Delta*, AMNESTY INT'L (2011), <http://www.amnestyusa.org/sites/default/files/afr440182011en.pdf> (hereinafter AMNESTY INTERNATIONAL) (describing the protest of Ogoni peoples against oil exploration and decrying the 1995 execution of Ken Saro-Wiwa and other Ogoni people).

8. See *id.* (noting that after the international outcry following the execution of Ken Saro-Wiwa, international bodies – including the UN in 1998 and African Commission in 2002 – published reports and conducted investigations in the Niger-Delta).

9. See *id.* (emphasizing that both the UN and the African Commission were alarmed by the humanly unacceptable level of environmental degradation in the Niger-Delta, particularly in Ogoni land; therefore, they urged the Nigerian government and Shell to take actions to remedy the environmental degradation caused).

10. See John Vidal, *Niger Delta Communities to Sue Shell in London for Oil Spill Compensation*, GUARDIAN (Jan. 7, 2015, 12:48 PM), <https://www.theguardian.com/environment/2015/jan/07/niger-delta-communities-to-sue-shell-in-london-for-oil-spill-compensation> (explaining that despite the reports of African Commission and UN and the attempts at legal resolution both the government and Shell have yet to clean up the environment).

Assessment conducted by UNEP, both are yet to engage in a cleaning-up operation.<sup>11</sup>

However, in 2005, hope was raised again that the end had gradually come to the venting of gas in the Niger-Delta when the Benin Federal High court, in *Gbemre v. Shell Petroleum Dev. Co.*,<sup>12</sup> declared gas flaring to be a “gross-violation” of the constitutionally guaranteed rights to life and dignity, and therefore ordered for the immediate steps to stop further flaring of gas in the Iwerhekan community of the Niger-Delta. Nevertheless, Shell continued its activities, the Government was also quick to remove the presiding judge, Justice Nwokorie, from the case by having him transferred to another court district in the far Northern state of Katsina; and the lead plaintiff in the action was detained.<sup>13</sup> To be factual, the Nigeria-Shell wager is one out of many instances that show the Nigerian Government’s collaboration with various oil companies to heighten climate change.

As a matter of law, both oil companies and Sovereign States have responsibilities to protect populations against climate change. But the Nigerian Government and the multi-national oil companies in the Niger-Delta have long been grappling with international agreements<sup>14</sup> and courts’ orders for such responsibilities. Howbeit, with responsibility to protect against climate change, the understanding portrayed by this article has to be understood as

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11. *See id.*

12. *Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd.* [2005] 1 AHRLR 151 (Nigeria).

13. *See* Hari M. Osofsky, *Climate Change and Environmental Justice: Reflections on Litigation Over Oil Extraction and Rights Violation in Nigeria*, 1 J. HUM. RTS. & ENVTL. 2, 189, 190 (2010) (condemning Shell’s refusal to follow the order of the Benin Federal High Court in *Gbemre*).

14. *See also* Sophia V. Schweitzer, *Are Countries Legally Required to Protect Their Citizens From Climate Change?*, GLOBAL VOICES (July 17, 2015, 8:41 AM), <https://globalvoices.org/2015/07/17/are-countries-legally-required-to-protect-their-citizens-from-climate-change/> (noting that in 2008, the International Council on Human Rights Policy in Geneva, Switzerland, wrote in a report about climate change and human rights: “As a matter of law, the human rights of individuals must be viewed in terms of state obligations.” But the world has long been grappling with international agreements for such obligations. From the 1997 Kyoto Protocol to repeated Conference of the Parties to the United Nations Framework Convention on Climate Change — COP — meetings, the best efforts have struggled to gain traction, in large part because political actions have not kept pace with promises made).

minimal: there may well be other ways of redressing human rights-based climate injustice that could be characterized by a demand that makes oil companies solely responsible for the protection against climate change. This Article leaves open, then, the challenging task of understanding responsibility to protect against climate change from the view point of corporate responsibility.

Instead, I take up the more focused task of showing that a discussion that meets the minimal understanding of this Article can be secured in a discussion in which responsibilities to protect against climate change are exclusively seen as that of Sovereign States, that is, I demonstrate how the concept of 'Sovereign States' Responsibility' is expanded to cover a broader social issue such as the protection of populations against global warming.

The aim of this Article is to contribute to the current discourse on global warming and determined adaptation to climate change. On the other hand, its purpose is to show that reduction in global temperature below two degrees Celsius requires a re-jigging of inactive legal orders, particularly the imposed ones.<sup>15</sup> Recognizing the inertia of the imposed British legal order, which accounts inter alia for Nigeria's failure to wean itself off gas flaring, this Article draws heavily on the sovereign state of Nigeria. For instance, Nigeria is ranked second in the whole world in term of cumulative gas flared.<sup>16</sup> Specifically, the 2015 statistical report of Organization of Petroleum Exporting Countries (OPEC) shows that, from oil wells in the Niger-Delta, 10,736.8 million standard cubic meters were flared out of the 86,325.2 millions produced in 2014.<sup>17</sup> The implication, as identified in the 5th Assessment Report of Inter-government Panel

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15. See Rosamund Pearce, *Two Degrees: The History of Climate Change's Speed Limit*, CARBON BRIEF (Dec. 8, 2014, 10:45 AM), <http://www.carbonbrief.org/two-degrees-the-history-of-climate-changes-speed-limit> (noting that the idea of the two-degree limit started in more mainstream political settings soon after the intervention of researchers from the Stockholm Environment Institute (SEI) in 1990).

16. Roseline Okere, *Nigeria Burns Of \$5 Billion Resources Yearly from Gas Flaring*, GUARDIAN (Nov.6, 2015), [www.ngrguardiannews.com.2015/11/nigeria-burns-off-5-billion-resources-yearly-from-gas-flaring/](http://www.ngrguardiannews.com.2015/11/nigeria-burns-off-5-billion-resources-yearly-from-gas-flaring/) (reporting that the Nigerian government is ranked as the 2<sup>nd</sup> most gas flaring country in the world).

17. *Id.* (discussing further that about 63 percent of 85 billion cubic feet of Associated Gas (AG) produced during the production of crude oil is currently being flared in Nigeria, and lamenting that its cost implication is over \$3.5 to \$5 billion yearly from over 257 flow stations in the Niger-Delta).

on Climate Change (IPCC), is that gas flaring has growing severity and a cumulative effect on the climate.

Notwithstanding its restriction to the sovereign state of Nigeria, this Article will attempt a comparative analysis between the Nigerian legal order and that of The Netherlands; through the appraisal of the social justice system explored in Urgenda case which visibly apportions responsibility to protect the Dutch population against climate change on The Netherlands Government -the replication of which according to this Article is obviously rhetorical in Nigeria unless its legal order is re-jigged. The choice of the Urgenda climate action is not arbitrary; the judgment is a major sophisticated Europeans courts verdict that has for the first time ordered the Government to protect its citizens from climate change.<sup>18</sup>

Lest I forget, the main narratives referred to in this Article can be roughly labeled as sovereign state, responsibilities to protect, climate change, and imposed legal order. The first narrative is understood within the contemplation of Stephen Krasner's first and second notions of Sovereignty.<sup>19</sup> Therefore, sovereign state will be used to refer to both the effectiveness of domestic authority structures and the ability to control cross-border issues. The second narrative, responsibility to protect, follows the December 2000 definitional report of the International Commission on Intervention and State Sovereignty (ICISS),<sup>20</sup> which states that individual states have the responsibility to protect their own citizens from catastrophes, and when they are unable or unwilling to do so, that responsibility should

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18. Unique: Dutch Court Orders Government to Do More Against Climate Change, ENERGY POST (June 25, 2015) [energypost.nl/unique-dutch-court-orders-government-climate-change/](http://energypost.nl/unique-dutch-court-orders-government-climate-change/) (quoting Urgenda that this is the first time that a judge has ordered a State to take measures against climate change); *see also* An Inconvenient Suit: Fighting Climate Change in Court, JAY TAYLOR MEDIA (July 25, 2015) [jaytaylormedia.com/an-inconvenient-suit-fighting-climate-change-in-court](http://jaytaylormedia.com/an-inconvenient-suit-fighting-climate-change-in-court).

19. Ikari, *supra* note 3.

20. *See* Harry Kreisler, *Sovereignty*, (Mar. 31, 2003), <http://globetrotter.berkeley.edu/conversations/people3/Krasner/krasner-con0.html> (explaining that there are, among others, two notions of sovereignty. First, sovereignty is a clearly understood organic set of rules which are adhered to almost all the time. The second definition is called interdependence sovereignty, which is the notion that states are losing their ability to control movements across their own borders).

be taken up by the wider international community.<sup>21</sup> Also, the narrative on climate change will be used in the light of the definition given by the United Nations Framework Convention on Climate Change, that is, “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”<sup>22</sup> Finally, the narrative *imposed legal order* refers to the imposed British legal order adapted to form the Nigerian legal tradition.<sup>23</sup>

This Article comprises of two installments. The first Section unfolds as follows: Part I will undergo a purposeful account of the de-sovereign process of the Niger-Delta and the colonial architecture of the Nigerian legal order. Part II evaluates the traditional understanding of the sovereign states responsibilities to protect. For a clear understanding of this Article, Part III shall proceed to construct climate protection as the sovereign states’ responsibility, showing the legislative confusion that hinders the Nigerian stake in the process of construction as well as the ethical contribution of Immanuel Kant’s deontological approach to human rights. In the closing aspect of the first section, the principle of differentiation, within the scope of the Paris Climate Agreement<sup>24</sup> is assessed for a pragmatic construction

21. See *The Responsibility to Protect*, ICISS (Dec. 2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. The expression “responsibility to protect” was first presented in the report of the International Commission on Intervention and State Sovereignty (ICISS), set up by the Canadian Government in December 2001 in response to Kofi’s Annan’s question of when the international community must intervene for humanitarian purpose, and refers to the global political commitment which was endorsed by all member states of the United Nations at the 2005 World Summit to prevent genocide, war crimes, ethnic cleansing and crimes against humanity.

22. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107, [http://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf) [herein after *U.N. Climate Change*] (outlining the framework for addressing global climate change, but refrains from making mandates on states but also setting Conference of Parties (COP) meetings to be held annually to adopt new rules).

23. See Olanrewaju Olamide, *Primary Sources of Law: Received English Law*, JET LAWYER (May 25, 2016), <http://www.djetlawyer.com/received-english-law/> (explaining that under the Interpretation Act doctrines of equity and STATUTE OF GENERAL APPLICATION make English law in effect prior to 1900 in force in Nigeria).

24. United Nations Framework Convention on Climate Change, Paris Agreement, FCCC/CP/2015/10/Add.1, annex (Jan. 29, 2016) (setting forth the



of sovereign states' responsibility to protect against climate change.

The second installment of this Article begins with Part IV, which presents the interaction between the anthropogenic gas emission and the climate system- the implication of which often results in human-rights violations, and also shows the intervening legal framework for the redress of the violations. Finally, despite the intervention of the principles of law, Part V will analyze that the sovereign state of Nigeria is still shirking in its responsibility to protect the climate system.

## II. THE DE-SOVEREIGN PROCESS OF THE NIGER-DELTA AND THE COLONIAL ARCHITECTURE OF NIGERIAN LEGAL ORDER

The government of Britain gave colony, a state of affair that ended in 1960 with the emergence of the sovereign state of Nigeria, to the people that currently constitute modern Nigeria at some point in their history.<sup>25</sup> Conversely, Nigeria grew into an internationally recognized sovereign nation in 1960, after a period of colonialism under the British government which spanned about a century beginning with the cession of Lagos to the British monarch in 1861.<sup>26</sup>

Nevertheless, before the advent of the British colonial rule there existed at various times, sovereign states consisting kingdoms, empires and emirates in Nigeria. Each sovereign state had its own indigenous pattern of government which was distinct from the other.<sup>27</sup> In other word, kingdoms such as the Ijaws, the Efiks, the Urhobos, the Itsekiris, etc. in Niger-delta area were differently administered.<sup>28</sup> While some of these kingdoms were accorded the

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most recent legal and policy schemes representing the latest effort to curb greenhouse gas emissions involving over 196 parties)[hereinafter Paris Agreement].

25. *Nigeria: Constitutional History and Legal Complex*, TREE & TREES, <http://lawnigeria.com/Nigeria.html> (last visited Jan. 5, 2017) (tracing the constitutional development history of Nigeria and presenting an analysis of the key factors of the Nigerian legal complex).

26. For the full text of the Treaty of Cession entered into on August 6<sup>th</sup>, 1861, see *Att'y Gen. v. John Holt & Co.* [1936] 2 NLR 1, 4-6 (Nigeria).

27. See generally *Att'y Gen. of Federation v. Att'y Gen. of Abia State & 35 Others* [2002] 28 NSCC 2001 (Nigeria).

28. See *id.*

respect of sovereignty and empires as no state during this period colonized and dominated the people of Niger-Delta,<sup>29</sup> others were under the control of assertive politics like Opobo and Obolo.<sup>30</sup>

However, the period between 1850 and 1894 came with a new wave of inter-group relations among these kingdoms with them having contacts through trades, historical origins of migration and inter-group marriages and cultural affinities. Trans-Saharan trade and the Trans-Atlantic trades further heightened inter-kingdom relationship with each kingdom respecting the independence and sovereignty of others for mutual gains.<sup>31</sup> In Nigeria generally, the sovereign kingdoms of the forest region, states of the savannah, empires as well as states of the Niger-Delta intermingled all over the Niger coast protectorate and beyond.<sup>32</sup>

In 1894, a British soldier Frederick Lugard came to Nigeria and thereafter was appointed as colonial administrator. In 1914, the Lugard-led British colonial administration in Nigeria tried to bring the culturally diverse people of Nigeria together under one colonial administration.<sup>33</sup> By this, all groups<sup>34</sup> hitherto independent came together and swore allegiance to uphold unity and prosperity of the colonial state.<sup>35</sup> Instead of upholding the unity claimed, the British, through the provisions of Clifford Constitution, took a calculated, instrumentally incremental approach to the unity of Nigeria, giving rise to the Okibe's observation that most of the colonial constitutional reforms de-emphasized the essence of corporate existence of Nigeria.<sup>36</sup>

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29. *Id.*

30. See Ben Naanen, *Bala Usman, History and the Niger Delta*, CHANNEL ONLINE (Sept. 2001), <http://www.waado.org/nigerdelta/Essays/BalaUsman/BenNaanen.html>.

31. *See id.*

32. See Dapo Fafowora, *Lord Lugard and the 1914 Amalgamation of Nigeria*, NATION NEWSPAPER (Feb. 14, 2013), <http://thenationonline.net/lord-lugard-and-the-1914-amalgamation-of-nigeria/>.

33. *See* Att'y Gen. of Federation v. Att'y Gen. of Abia State & 35 Others [2002] 28 NSCC 2001 (Nigeria).

34. *See id.*

35. *See id.*

36. See John A. Ayoade, *Nigeria: Positive Pessimism and Negative Optimism: A Valedictory Lecture by J. A. A. Ayoade*, MODERN GHANA (Sep. 23, 2010, 5:54 AM), <https://www.modernghana.com/news/297369/nigeria-positive-pessimism-and-negative-optimism-a-valedic.html>.

Thus, the clumsy constitution was followed by what Justice Kayode Esho characterized as “the worst of times—the age of Sir Arthur Richards, who contemptuously gave Nigeria a constitution without a consultation.”<sup>37</sup> The Nigerian state was divided into three regions by the Arthur Richard Constitution of 1946.<sup>38</sup> “The minority groups”, a name tagged on the Niger-Delta people by the colonial government expressed their fears in the new state. The relationship between the various groups, especially the majority and the minority groups, because suspicious with the minority clamoring for equity and fairness.<sup>39</sup>

Disregarding the interest of the minorities for the moment, the same session of the British parliament that made the 1946 constitution quickly followed up in March 1945 by passing four ordinances which Nigerian Nationalists described as “obnoxious.”<sup>40</sup> Three of these were the Mineral Ordinance, the Public Land Acquisition Ordinance, and the Crown Land Ordinance. Afterwards, the Nigerian government embraced the spirit of these laws. For instance, though amended in many instances along the way, the 1969 Petroleum Act adopted the totalizing phraseology “(T)he entire ownership and control of all petroleum in, under or upon any land shall be vested in the state.”<sup>41</sup> Similarly, the Land Use Act<sup>42</sup> is a direct descendent of the Crown Lands Ordinance.

The British colonial officials began the architectural process of Nigerian legal order with the introduction of English law to the colony and protectorate of Lagos and the upper territory respectively in 1863 and 1886.<sup>43</sup> But the British colonial officials started making rules for the Niger-coast protectorate in 1872 with the crown enactment of an Order-in-Council territory in the Bight of Benue.<sup>44</sup>

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37. *Id.*; see OLUFEMI & TAIWO, *supra* note 4, at 45.

38. *Id.*

39. See Att’y Gen. of Federation v. Att’y Gen. of Abia State & 35 Others [2002] 28 NSCC 2001 (Nigeria).

40. See Ayoade, *supra* note 36.

41. *Id.*

42. Land Use Act (Decree No. 6/1978) (Nigeria).

43. Joseph R. Bassey, *How the British Developed Modern Legal System in the Niger Coast Protectorate, 1872-1914: A study in Legal History*, 3 A. J. PHIL. SOC. 1 (2013).

44. See *id.*

Between 1890 and 1913, the Foreign Jurisdiction Act<sup>45</sup> conferred power on the Crown to enact rules for all the protectorates except Lagos colony. However, in 1914, the legal system of the protectorates and the Lagos colony were harmonized into a single legal system.<sup>46</sup>

In fact, the Nigerian legal order has been greatly influenced by its colonial past as a part of the English commonwealth, with English common law, doctrines of equity as well as statutes of general application in force in England as at 1st January, 1900<sup>47</sup> forming the basis of its jurisprudence. However, by imposing the British colonial legal system in Nigeria, instead of developing the existing customary laws of the independent and sovereign state of Nigeria, the effect is to relegate the Nigerian sovereignty, an act which contradicts the very nature and basis of the independence claimed in 1960. Nonetheless, the reality of Nigeria being a sovereign state with many responsibilities is not in doubt. Therefore, Part II presents the understanding that sovereign states have a responsibility to protect the rights of individuals, and not solely the rights of nations. In short, sovereignty is responsibility.

### III. UNDERSTANDING THE SOVEREIGN STATE'S RESPONSIBILITY TO PROTECT

Concluding the European religious wars of the 16th and 17th centuries, the Treaty of Westphalia in 1648<sup>48</sup> designed a system of

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45. Foreign Jurisdiction Act 1890, 53 & 54 Vict. c. 37 (U.K.) ("It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.").

46. Bassey, *supra* note 43.

47. See Interpretation Act (1990), Cap. (192), §32; see also GAIUS EZEJIOFOR, INTRODUCTION TO NIGERIAN LAW 6 (Cyprian O. Okonkwo ed., 1980) (listing the Statute of Frauds of 1677, Wills Act of 1837, Infant Relief Act of 1874, Conveyance Act of 1881, Sales of Goods Act of 1893, Settled Lands Act of 1882, Land Transfer Act of 1897, Partition Acts of 1868 and 1876, Real Property Limitation Act 1833 as amended in 1874, and Fatal Accidents Acts of 1846 and 1864 as part of the Statutes of General Application in force in England as of January 1<sup>st</sup>, 1900).

48. See C.N. Trueman, *The Peace of Westphalia*, HIST. LEARNING SITE (Mar. 25, 2015), <http://www.historylearningsite.co.uk/the-thirty-years-war/the-peace-of-westphalia/> (describing that the Peace of Westphalia, also known as Peace of

independent nations which has recognized sovereign legitimate authority, sovereign supremacy, and the principle of non-interference in the internal affairs of other states<sup>49</sup> as essential attributes. In fact, this treaty paved the way for the development of international law because it recognized that Rome could no longer command the allegiance of the states and that the Pope has no right to interfere in the affairs of the states in the name of the highest spiritual authority.<sup>50</sup> Much of international law, at least until World War II was designed to reinforce sovereignty.

Shocked with the excesses in unbridled sovereignty, political philosophers such as Locke, Rousseau and Jefferson, among others, emphasized the obligations of Sovereign States towards their citizens. Their beliefs were incorporated in the Declaration of Independence and fueled the American and French Revolution.<sup>51</sup> However, with the horrors of the Nazi genocide and the lessons of Nuremberg War Crimes Tribunal,<sup>52</sup> sovereign states' responsibility to protect the rights of individuals began to gain wide acceptance, and international human rights treaties proliferated. In other words, sovereign states' responsibility is not restricted to the protection of a nation's right, but also covers the protection of individual rights.<sup>53</sup>

In some cases, the perceived need to protect human rights and

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Exhaustion, ended eighty years of conflict between Spain and the Netherlands and the German phase of the Thirty Years War, and was ratified on May 15, 1648).

49. See Thomas McShane, *International Law and the New World Order: Redefining Sovereignty*, in U.S. ARMY WAR COLLEGE GUIDE NATIONAL SECURITY POLICY AND STRATEGY 4 (J. Boone Bartholomees, Jr. ed., 2006).

50. See *id.* (narrating how the Treaty of Westphalia removed power from traditional religious and political leaders in Rome).

51. See McShane, *supra* note 49, at 4 (detailing similarities between enlightenment philosophy and the philosophies that fueled the American and French Revolutions).

52. See *The Legacy of Nuremberg*, AMERICAN RADIOWORKS, <http://americanradioworks.publicradio.org/features/justiceontrial/nuremberg1.html> (last visited Jan. 10, 2017) (describing the International Military Tribunal at Nuremberg that sentenced twelve former Nazi officials to death for crimes committed during World War II).

53. See generally Luke Glanville, *The Responsibility to Protect Beyond Borders*, 12 HUM. RTS. L. REV. 1 (2012) (clarifying the current legal status of the idea that bystander states have a collective responsibility to protect populations beyond borders from mass atrocities when the host state fails to carry out such responsibility).

maintain peace has led to humanitarian intervention,<sup>54</sup> thereby extending the frontier of the understanding of sovereign states to protect their populations. In the words of Francis Deng, the enjoyment of the sovereign right of non-interference was conditional upon the performance of sovereign responsibilities for the protection of population.<sup>55</sup> Conversely, the principle of non-interference in the internal affairs of sovereign states yield to humanitarian intervention where the host state is manifestly failing to do so.<sup>56</sup>

To elaborate, an independent commission established by the Canadian government<sup>57</sup> wrote sometime in 2001 of a 'primary' or 'default' responsibilities which was borne by individual states for the protection of their own populations, and the wider society of states has 'residual' responsibility to protect populations, through military intervention if necessary, in instances where states were unwilling or unable to carry out their own responsibilities.<sup>58</sup> The United Nations General Assembly unanimously enclosed<sup>59</sup> the understanding of sovereign state responsibility to protect as advanced by an independent commission of experts. Subsequently, this understanding has been adopted by the Security Council and the General Assembly in numerous resolution.<sup>60</sup>

Since the adoption of this understanding by the United Nations, the 'Responsibility to Protect' (R2P) has assumed a prominent place

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54. See Michelle Maiese, *Human Rights Protection*, BEYOND INTRACTABILITY (June 2004), <http://www.beyondintractability.org/essay/human-rights-protect> (averring that the essence of humanitarian intervention is to protect the right to life and physical integrity and attempt to limit unrestrained power of the state).

55. See Roberta Cohen, *Reconciling R2P with IDP Protection*, BROOKING BERN PROJECT INTERNAL DISPLACEMENT 4 (Mar. 25, 2010), <http://responsibilityto-protect.org/reconciling%20with%20Rtop.pdf> (paraphrasing writings of former Representative of the UN Secretary-General on Internally Displaced Persons Francis Deng).

56. See *id.* at 5 (outlining the principal of international law that prohibits the intervention of other states into the domestic affairs of states).

57. See *The Responsibility to Protect*, *supra* note 21, at 81 (noting that the commission who prepared the report were appointed by the Canadian Prime Minister in response to a challenge by the UN Secretary-General that the international community establish a new method for responding to mass atrocities).

58. *Id.*

59. *Id.*

60. See G.A. Res. 60/1, ¶¶ 138-40, 2005 World Summit Outcome (Oct. 24, 2005); see also *About R2P*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, [http://www.globalr2p.org/about\\_r2p](http://www.globalr2p.org/about_r2p) (last visited Jan. 3, 2017).

in discussions around the prevention and protection of populations from mass atrocities and humanitarian crises.<sup>61</sup> However, as the climate change threatens human survival, the ethical human right sense of duty is needed to transform climate change from an environmental to humanitarian crisis so as to make climate protection a collective responsibility of sovereign states.<sup>62</sup> The following Part will reveal how philosophical discipline of ethics is used to construe protection against climate change as sovereign state responsibilities. The deontological approach of human right will impute specific responsibility on those who choose inaction on the climate, duty to self, to others and to future generations. With this approach, the demanding urgency of sovereign states responsibility to decarbonize the climate system is revealed.<sup>63</sup>

#### IV. THE CONSTRUCTION OF PROTECTION AGAINST CLIMATE CHANGE AS SOVEREIGN STATES RESPONSIBILITY

##### A. THE DEONTOLOGICAL APPROACH OF HUMAN RIGHTS

In order to save the term “sovereign state responsibility to protect” from a meaningless buzzword when it comes to climate change, every sovereign state must take a stance on whether she perceives ‘responsibility to protect against climate change’ as a broader social issue or as an ethical appellation to human right.

As stated in the previous Part, since the conclusion of World War II, the idea that sovereign states have responsibilities to protect the rights of individual began to gain wide acceptance, but the human rights-based approach to climate governance is relatively undeveloped and the precise connection between states responsibilities and protection of populations against climate change

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61. Glanville, *supra* note 53, at 10.

62. Michael Hoexter, *Are We Free to Pollute the Atmosphere? Climate Change, Wealth and Liberty - Part 1*, FUTURELAB (May 3, 2009), <http://www.futurelab.net/blog/2009/05/are-we-free-pollute-atmosphere-climate-change-wealth-and-liberty-part-1>.

63. Kant Immanuel, First Section: Transition from the Common Rational Knowledge of Morals to the Philosophical, (1785), GROUNDWORK OF THE METAPHYSIC OF MORALS.

has yet not been extremely articulated.<sup>64</sup> Some commentators have argued that using rights language to describe broader social issue, like that of climate change, confuses and devalues the existing human rights framework.<sup>65</sup> While this argument is unmindful of the ethical appeal of human right approach – that is, to transform climate change from an environmental into a humanitarian problem – it exposes the turbulent situation in which the human rights based climate governance find itself.

The construction of protection against climate change as sovereign state responsibilities is primarily an ethical process. One way of articulating the mitigation and adaptation of climate change is through the idea of duty.<sup>66</sup> Global mitigation effect and local adaptation effort can be construed with one another, if one's efforts to adaptation are just and sufficiently sustainable.<sup>67</sup> This is a practical prescription reflecting a deontological human rights approach to sovereign state responsibility against climate change.<sup>68</sup> Therefore, as argued by Stephen Humphreys, the effects of human-induced climate change including pollution and floods would consequently, mean a violation of rights such as the right to food and adequate housing.<sup>69</sup>

Nevertheless, while deontological construction of protection against climate change as sovereign states' responsibility will not only reduce the effect of global warming on vulnerable population, but may also hinder the development of sovereign states- which by and of itself a matter of human right.<sup>70</sup> This obvious paradox is more

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64. See Jon Von Doussa et. al., *Human Rights and Climate Change*, 14 AUSTL. INT'L L.J. 161, 162-63 (2010).

65. See Rachel Payne, *Climate Change, Basic Rights, and International Obligations*, 2 YALE REV. INT'L STUD. 64, 74-75 (Summer 2012).

66. See *Climate Change and Animal Rights Ethics: Non Consequentialism* 3 (2011) in ANIMAL ENVIRONMENT AND CLIMATE (noting that one has a duty to try to change things for the better, for the whole of creation, for at least as long as the opportunity exists. That is the duty of mitigation, to try to stop global warming from happening, or sow it down).

67. See *id.*

68. See *id.*

69. See Ansgar Fellenderf & David Immer, *The EU's Responsibility to Protect Environmentally Displaced People*, E-INTERNATIONAL RELATIONS (Aug. 22, 2015), <http://www.e-ir.info/2015/08/22/the-eus-responsibility-to-protect-environmentally-displaced-people>.

70. See Marcello Di Paola & Daanika Kamal, *Conclusion: Climate Governance as Human Rights Protection*, GLOBAL POL'Y, (Nov. 28, 2015),



explicit in the words of Saran and Mishra that resistance to emissions cut by sovereign states for their development should not be seen as reflecting irresponsibility, but rather as following the responsibilities that such sovereign state have towards their citizen.<sup>71</sup>

While this paradox is undeniable, a more consequentialist view of the worst-case scenarios of climate change will lead some people to unethical shortcuts.<sup>72</sup> The consequences of gas flaring on the climate system are many. These include rising temperature, extreme weather events, and an increase in disease incidence which in effect destroy healthy human life. Nonetheless, deontological approach to sovereign states protection against climate change does not have to be absolute.<sup>73</sup> However, the system of human rights is not absolute.

Take the case of differentiation of sovereign states' responsibility to protect against climate change, the Western ethics of deontology may seem to obligate "polluting states" to assume major responsibilities of migrating climate change, there are several large emissions countries that have no ability to mitigate the problem of climate change and even many past polluters, for the most part, were not aware that their actions would have harmful consequences.<sup>74</sup> The next installment of this Part will look at how these responsibilities differentiate among the sovereign states. In particular, it will demystify the misdirecting approach of the 2015 Paris Climate Agreement<sup>75</sup> to the construction of fair differentiation of sovereign states responsibilities to kick against climate change.

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<http://www.globalpolicyjournal.com/blog/28/11/2015/conclusion-climate-governance-human-rights-protection> (noting that many states would not find the move for emission to be particularly desirable because it would decrease their self-determination as well as their sovereignty regarding their development choices).

71. See *id.* (asserting that Saran and Mishra's argument exposes the situation in which high aggregate but low per capital emitters such as China, Brazil, Mexico, South-Africa, Indonesia, and others find themselves today).

72. See *Climate Change and Animal Rights Ethics*, *supra* note 66 (recognizing ethical pitfalls of consequentialist view of climate change and giving instance of unethical shortcuts such as nuclear energy, which produces radioactive waste and petroleum energy, which produces gas flares).

73. See Hoexter, *supra* note 62.

74. Fellenderf & Immer, *supra* note 69.

75. Paris Agreement, annex.

B. DIFFERENTIATION IN SOVEREIGN STATES RESPONSIBILITIES:  
WHERE HAS PARIS CLIMATE AGREEMENT MISFIRED?

After noting the deontological construction of climate protection as sovereign states' responsibility, serious disagreements remain about how the principle of "differentiation" regarding the protection against climate change as sovereign states responsibility could be constructed. Conversely, what is the most just way to measure the quantum of responsibility that will be allotted to each sovereign state and amenable to translation into policy?

However, when the UNFCCC<sup>76</sup> was established in 1992, sovereign states were dissected according to their level of development at the time through the principle of Common but Differentiated Responsibility.<sup>77</sup> This principle has since been used as a means of assigning responsibilities. Under the 1997 Kyoto Protocol<sup>78</sup> only developed sovereign states are obligated to reduce emissions, but developing states are allowed to do such activities as required for their development.<sup>79</sup> As it turns out, there is an international consensus that the ongoing responsibility to protect the climate system is to be shared, though not necessarily evenly.<sup>80</sup> The lingering question is how can this responsibility be fairly differentiated? Insofar as this question hinges on the matter of protection against

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76. Marshall Shepherd, *So What is this Paris Climate Meeting Anyway? The Basics of COP21*, FORBES (Nov. 25, 2015, 10:06 AM), [www.forbes.com/sites/marshall/shepherd/2015/11/25/so-what-is-this-paris-climate-meeting-anyway-the-basics-of-cop21/N2715e4857aOb1c37fe0215c079](http://www.forbes.com/sites/marshall/shepherd/2015/11/25/so-what-is-this-paris-climate-meeting-anyway-the-basics-of-cop21/N2715e4857aOb1c37fe0215c079).

77. United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), principle VII (Aug. 12, 1992).

78. United Nations Framework Convention on Climate Change, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, U.N. Doc. FCCC/CP/1997/7/Add.1, (Dec. 10, 1997) [hereinafter *Kyoto Protocol*] (defining the Kyoto Protocol as an international agreement linked to the United Nations Framework Convention on Climate Change, which commits its parties by setting internationally binding emission reduction targets).

79. *Id.* art. 10.

80. *Kyoto Protocol* art. 2, ¶ 2; see Dan Weijers et al., *Sharing the Responsibility of Dealing with Climate Change: Interpreting the Principle of Common but Differentiated Responsibilities*, in PUBLIC POLICY: WHY ETHICS MATTERS 141-42 (Jonathan Boston et al. eds., 2010) [hereinafter *Sharing the Responsibility*] (arguing that the best hope for reaching an effective international agreement on climate change is to base it on the widely agreed upon principle of common but differentiated responsibilities).

climate change, whether the existing sharing of the responsibility can be concluded as a 'fair differentiation' depends on a mix of factors, including whether it is within the scope of the existing climate agreement and whether it is consistent with normally relevant notion of equity.

In this regard, the Paris Climate Agreement reached on 12 December 2015 by all 195 signatories to the UN Framework Convention on Climate Change has widely recognized that developing and developed States parties have different levels of responsibility to reducing greenhouse gas emissions<sup>81</sup> and slowing down global temperature rise.<sup>82</sup> Whether the differentiation is consistent with the normally relevant notion of equity will depend on the content of the Agreement. Suffice to mention here that an equitable differentiation of sovereign states' responsibility to combat climate change will require a hybrid adoption of all the three basic principles of equity, that is, 'Polluter Pays Principle (PPP),' 'Beneficiary Pays Principle (BPP),' and 'Ability to Pay Principle (APP).'<sup>83</sup>

While some scholars argued that both polluting and benefiting from polluting create some moral responsibilities to deal with climate change, others dissented that states with the ability to pay for mitigating and adapting to climate change should be held responsible for the historic greenhouse gas emissions.<sup>84</sup> Nonetheless, ethics perceive climate protection as sovereign state responsibility. In as much as each of these three basic principles is not without possible moral justification, it is trite therefore to fittingly compress these principles for a just and fair 'differentiation' of sovereign states' responsibilities to tackle climate change. Thus, it follows that rich states should pay for their own polluting and then share the costs associated with both the minor amount of polluting caused by rogue

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81. *Kyoto Protocol* art. 2, ¶ 2; see Dan Weijers et al., *Sharing the Responsibility*, *supra* note 80 at 141-42 (arguing that the best hope for reaching an effective international agreement on climate change is to base it on the widely).

82. *Kyoto Protocol* art. 2, ¶ 2; see Dan Weijers et al., *Sharing the Responsibility*, *supra* note 80 at 141-42 (arguing that the best hope for reaching an effective international agreement on climate change is to base it on the widely agreed upon principle of common but differentiated responsibilities).

83. Dan Weijers et al., *Sharing the Responsibility*, *supra* note 80 at 141-42.

84. Paris Agreement, annex art. 2.

states and very poor states. But in terms of historic pollution that was unknowingly caused by previous generations, all states, including both the developed and underdeveloped states, except very poor states should, in the spirit of an ethical framework, have the burden with regards to them per capital production capacity or different natural circumstances.

By the tenor of the Paris Agreement, all the States' parties have a common commitment to peaking carbon emission 'as soon as possible'<sup>85</sup> through their voluntary pledge called 'Intended Nationally Determined Contributions (INDCs).'<sup>86</sup> Howbeit, the Agreement recognizes the ethical perception of 'differentiation' of sovereign states' responsibilities in light of "different national circumstances."<sup>87</sup> The Agreement indicates that developed countries "should" translate their NDCs into specific economy wide targets, again recognizing different national circumstances.<sup>88</sup> In the context of adaptation, the Agreement also suggests differentiated responsibilities for supporting the developing state parties for effective implementation and observing that developed country mitigation efforts will allow developing countries to meet more ambitious goals.<sup>89</sup>

As equitable as the application of the 'differentiation' principle seems to be, the Paris Agreement misfires when it provides no basis for binding climate action.<sup>90</sup> The state parties only agreed on a global 'stock take' process that will make them revise their INDCs and increase their ambition 'every five years.'<sup>91</sup> Regrettably, by the time they are required to re-examine these target in 2020, there is a

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85. Mariana Jimenez, *Mexico and the Climate Change in the Light of the COP21 Agreement*, RENEWABLE ENERGY MEXICO (Dec. 22, 2015), <http://www.renewableenergymexico.com/mexico-and-the-climate-change-in-the-light-of-the-cop21-agreement> (noting that the 195 world leaders gathered in Paris finally agreed on a pact for slowing global warming down).

86. Weijers et al., *supra* note 80, at 142-46.

87. Paris Agreement, art. 2(2).

88. Paris Agreement, annex art. 4.

89. *Id.* ¶ 4.

90. *See id.* ¶ 7 (identifying the importance of international cooperation and taking into account the needs of developing states).

91. *See* Hal Rhoades, *COP Out: The Hollow Promise of the Paris Climate Deal*, GAIA FOUNDATION BLOG (Dec. 16, 2015), [www.gaiafoundation.org/cop\\_out\\_why\\_the\\_pass\\_agreement\\_is\\_hollow](http://www.gaiafoundation.org/cop_out_why_the_pass_agreement_is_hollow) (pointing out during the negotiations of the Paris Agreement that it would not save the world from climate catastrophe).

tendency for global carbon emissions to have peaked because there is every likelihood that the sovereign states would have emitted enough carbon to lock themselves into warming of 1.5°C plus.<sup>92</sup> The next Part, therefore, will focus on the obstinate refusal of Nigeria to mitigate the rising carbon dioxide in the oil bearing communities of Niger-Delta as a major stake for peaking carbon emission. The Niger-Delta gas emission accounts for one-sixth of the worldwide gas flaring, which in turn spews some 400 million tons of carbon dioxide into the atmosphere.<sup>93</sup> As pointed out in the Introduction, after Russia, Nigeria flares more gas than any other country in the world in terms of total volume of gas flared.<sup>94</sup>

#### C. THE RISING CARBON-DIOXIDE IN NIGER-DELTA AND THE CHALLENGING LEGISLATIVE CONSTRUCTION OF ZERO-GAS EMISSION AS SOVEREIGN RESPONSIBILITY

While one might still believe that oil and gas is predominantly a source of Nigerian economic sustenance since petroleum accounted for seventy and eighty per cent of export and export earnings in 1970 and the Nigerian economy has solely depended on the petroleum sector as the major source of government revenue and foreign exchange, it is no longer accepted that the Nigerian oil industry has only positive impacts.<sup>95</sup> The evidence is clear. Since Nigeria became a major oil producer, many problems have arisen in the industry, mainly the massive discharge of carbon dioxide (CO<sub>2</sub>) into the atmosphere from the combustion of gas.<sup>96</sup> The oil companies, the

92. See Paris Agreement, ¶¶ 4, 14 (indicating global stock is when stock is periodically taken of the implementation of the Paris Agreement to assess the progress towards attaining the purpose and goals of the Paris Agreement).

93. See *id.* ¶ 86 (noting that the stock-take process of every five year does not augur well for the health of the planet that requires urgent attention).

94. See Alex Abutu, *Over 6,744 cases of oil spill recorded since '76*, DAILY TRUST (Feb. 25, 2015), <http://www.dailytrust.com.ng/daily/environment/47839-over-6-744-cases-of-oil-spill-recorded-since-76> (reporting the World Bank study commissioned on gas flare in Nigeria); see also *Global Gas Flaring Reduction Partnership*, WORLD BANK (Dec. 12, 2016), <http://www.worldbank.org/en/programs/gasflaringreduction#7>).

95. See Okere, *supra* note 16.

96. See IDOWU ADEGBITE, *COMPENSATION AND THE NIGERIAN PETROLEUM INDUSTRY: THE OGONI PEOPLE* 46 (1997) (describing that the situation in Niger-Delta region, particularly Ogoni land is pathetic if one considers the low level of social economy development vis-a-vis the huge flare of gas in the area).

local communities, and even the government have not been able to solve the problem of devastating pollution such as machinery, gas flares, and light pollution that always disrupts scenic views and clear night skies. There is the added problem of climate change, which has serious implications for both Nigeria and the rest of the world. The people most affected in Nigeria are Niger-Delta people.

As a result, Nigeria has become increasingly aware of the need to wean itself from its crude oil dependency and thus wage war against climate change. There is no doubt that the carbon dioxide emitted because gas-flow station sites adversely depletes quality of the climate system.<sup>97</sup> Nevertheless, same gas has been of great use in Nigeria since early '80s; especially for power generation, industrial heating, fertilizer, and petrochemical manufacturing, just to mention but a few.<sup>98</sup> These instances of increasing utilization of gas lead to the paradox that characterizes the failing compliance with the zero-gas flaring policy in Nigeria. Nonetheless, the demand for emission cut is still in vogue.

This is not a novel demand. The sovereign state of Nigeria acknowledged this need a long time ago and made demands that multi-national oil companies should be responsible for zero gas flaring.<sup>99</sup> The international community, since the 1992 United Nations Framework Convention on Climate Change (UNFCCC), has constructed additional demand such as sovereign states' responsibility towards emission cuts. What is novel in Nigerian legislative provision on 'zero gas flaring' is that statute(s) or bill(s) have started to look beyond individual/corporate responsibility to

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97. See ADEGBITE, *supra* note 96, at iii (noting that the devastating pollution has defied solution).

98. Ojide Makuachukwu Gabriel, *Impact of Gas Industry on Sustainable Economy in Nigeria: Further Estimations Through Eview*, SCIENCE ALERT (2012), <http://scialert.net/fulltext/?doi=jas.2012.2244.2251> (arguing that modern society cannot seriously address issues of development if such consideration is not based on the foundation of effective energy planning and noting that the main driver of gas utilization projects in Nigeria had been the government's desire to create more wealth and diversity the economy of the country).

99. See generally Okere, *supra* note 16 (explaining that Nigeria has been making frantic effort to end gas flaring since 1969 when the General Yakubu Gowon-led military government ordered oil companies operating in the oil rich Niger-Delta to work towards ending gas flaring by 1974; thus, to ensure the realization of the target, an Associated Gas Re-injection Act of 1979 No. 99 was introduced).

protect climate system and conceptualizes sovereign state responsibility, questioning the existing paradigm.<sup>100</sup>

For instance, with the activation of Kyoto Protocol in 2005, Nigeria Environmental Standards, Regulation and Enforcement Agency (NESREA) Act<sup>101</sup> was enacted on July 31, 2007.<sup>102</sup> The Act, however, fails to specifically impute such a responsibility to the sovereign state of Nigeria. Running through the pages of NESREA Act, there is neither a single mention of what exactly is meant by sovereign states' responsibility to protect their populations, nor a mandatory provision showing the government's institutional capacity to deal with climate change. This omission, alone, results in constructive challenge that hinders legislative construction of climate protection as the responsibility of Nigerian sovereign state.

In contrast to NESREA Act, a Bill to establish Climate Change Commission<sup>103</sup> which is currently at the second reading stage of the Nigerian parliamentary upper chamber would formally establish a robust institution/agency shoulder the responsibility of climate change governance. As of surety, the strength of the Bill is that the proposed Agency would be responsible for the development of action plans, expansion of international cooperation and coordination of informed policy response to the issue of climate change.<sup>104</sup> Nevertheless, its weakness is that it does not elaborate on the

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100. See The Grantham Research Institute on Climate Change & the Environment, *Global Climate Legislation Study: Nigeria*, LONDON SCH. ECON. & POL. SCI. (Dec. 7, 2015), <http://www.lse.ac.uk/GranthamInstitute/legislation/countries/nigeria/> [hereinafter *Global Climate Legislation Study: Nigeria*].

101. Nigeria Environmental Standards, Regulation and Enforcement Agency Act (2007) Cap. (N164 LFN) (Nigeria) [hereinafter NESREA Act].

102. See NESREA Act, ¶¶ 1 (3)[c], 7(c).

103. See *Global Climate Legislation Study: Nigeria*, *supra* note 100 (stating that on December 9, 2010, both Houses of the National Assembly passed the climate commission Bill, but the Bill did not receive the assent of the then President Goodluck Ebele Jonathan; consequently, the current Parliament re-introduced the Bill and again was passed by the lower chambers).

104. See Emmanuel Omoh Esiemokhai, *The Failure of the Colonial Legal System in Nigeria: A Rhapsodic Passacaglia on a Legal Theme*, NIGERIANS IN AMERICA (Oct. 11, 2001), <http://www.nigeriansinamerica.com/the-failure-of-the-colonial-legal-system-in-nigeria-a-rhapsodic-passacaglia-on-a-legal-theme/> (lamenting that the Nigerian government recreates and follows the British legal order which is an alien legal system that has ceased to be very relevant in regulating post-colonial, socio-economic relations in a state with religious and nation-state cleavages and a poor culture of political determinism).

construction of climate protection as the Nigerian government's responsibility or how the agency will get the government to decarbonize the climate.<sup>105</sup> The absence of clear identification of climate protection as the government's responsibility in the bill complicates the construction in Nigeria.

This poses the question of whether there will ever be a Nigerian legislative construction of climate protection as sovereign states responsibility. By embracing the British legal system, Nigeria, in making its own legal tradition, recreated and reinforced the colonial imposed legal order.<sup>106</sup> It has been argued that Nigerian law will never have the ability to function well because of its roots as a European means of exploitation of labor and resources and because it entrenched previous inactive tribal conflicts that continue today.<sup>107</sup> Its original purpose was never to resolve conflicts but to create them, never to limit power but to enable it.<sup>108</sup> Meanwhile, climate change has reached its crescendo, the anthropogenic gas emission flared in the oil bearing Niger-Delta has a great deal of stake in the climate change, and the Nigerian government needs to mitigate its effect as quickly as possible. Therefore, the second Section of this Article will focus on the discovery of anthropogenic gas induced climate change and the legal framework to combat the growing human rights violation of climate change. As will be concluded later in this Article, the Nigerian sovereign character, particularly its imposed legal order must be re-jigged for the emergence of jurisprudence that will deal with climate change.

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105. *Exploring the Creation of Nigerian Law*, NIGER DELTA POLITICS (Jul. 23, 2015), <https://nigerdeltapolitics.wordpress.com/2015/07/23/exploring-the-creation-of-nigerian-law/> (quoting Mamdani that "state law enforcement tended to rob custom of its diversity, homogenize it and equate it with the boundaries of the tribe").

106. *Id.*

107. *Id.* (quoting Mamdani that "state law enforcement tended to rob custom of its diversity, homogenize it and equate it with the boundaries of the tribe").

108. *Id.*



## V. THE GAS INTERACTION OF CLIMATE AND THE LAW

### A. THE CAUSAL CONNECTION BETWEEN GAS EMISSION AND CLIMATE SYSTEM

In Parts II and III, this Article discussed the way sovereign states responsibility to protect is interpreted and construed to cover right to protect populations against climate change. This Part will, on its own merit, explore the interaction between anthropogenic gas emissions and the climate system.

To begin with, the nature of climate system has a nexus with the origin of greenhouse gas emission which it now interacts with but in a typically alembicated scientific twist, does not suppress. Some clarity about the genesis of greenhouse gas emissions seems desirable as a starting point from considering its future. The historical literature has from the outset tended to be usually theoretical in bent, a clear sign that few familiar assumptions can be taken for granted. Hence, this Article holds to the view that the underlying forces behind their interaction should be sought in the observation interdependence of early hypotheses and their sequels.

Although the study of greenhouse gas emissions began with Edme Marriote in 1681<sup>109</sup> and consequently revisited by Joseph Fourier,<sup>110</sup> the more elaborated work was developed by Physicist John Tyndall. In 1850, he sought to demonstrate that carbon dioxide was one of

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109. See generally Jeffrey Lee, *History of the Greenhouse Effect and Anthropogenic Global Warming Research*, ENCYCLOPEDIA OF THE EARTH (May 7, 2012), [http://editors.eol.org/eoearth/wiki/History\\_of\\_the\\_Greenhouse\\_Effect\\_and\\_Anthropogenic\\_Global\\_Warming\\_Research](http://editors.eol.org/eoearth/wiki/History_of_the_Greenhouse_Effect_and_Anthropogenic_Global_Warming_Research) (explaining that sunlight penetrated the glass relatively easily, but the heat generated inside was trapped and measured by a thermometer. Edme Marriote, the youngest son of Simon Marriote administrator at the district Til-chatel and Catherine Denis of Marriote, is best known for his recognition in 1676 of Boyle's law about the inverse relationship of volume and pressures in gases. Also, in 1681, he observed that unlike other sources, sunlight easily passed through glass – the observation which Horace Benedict de Sausurre built upon to invent a heliothermometer in 1770, to measure the relative intensity of sunlight).

110. See *id.* (having successfully developed a simple mathematical model of the temperature of the atmosphere, Fourier proved that the model could be applied to the heating of greenhouse and other closed spaces). Joseph Fourier developed a number of hypotheses for the origin of extra heat, one of which was the possibility that the atmosphere itself traps heat that makes life possible.

those gases that impact temperature. He built a “ration spectrophotometer” in order to determine the ability of various gases to absorb heat. He observed that radiant heat (that is, long wave energy) was transmitted readily through nitrogen and oxygen, the main component of atmosphere, and concluded that more complex molecules, however, absorbed heat readily.<sup>111</sup>

Towards the end of the 19<sup>th</sup> century at Stockholm University, Sweden’s first Nobel prize winner, Svante Arrhenius<sup>112</sup> unwittingly uncovered secrets of the earth’s atmosphere. His starting point was a productive one. How, he asked, are the variations in carbon dioxide concentration in the atmosphere must be naturally variable? In his hypothesis, he observed that what led to excessively warm and cold periods<sup>113</sup> in the Earth’s history is the variation in carbon-dioxide. With the support of Samuel Langlay’s readings<sup>114</sup> and Arvid Hogbom discussion on the variations of CO<sub>2</sub> over geological time,<sup>115</sup> Arrhenius used the data with figures global temperature to work out how much of the incoming radiation was absorbed by CO<sub>2</sub> and so

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111. *See id.* (comparing water vapor in the air to a dam storing heat in the atmosphere, Tyndall argue that more complex molecules especially water vapor is relatively transparent to sunlight but effectively traps radiation from earth’s surface).

112. *See* Steve Graham, *Svante Arrhenius (1859 – 1927)*, NASA EARTH OBSERVATORY (Jan. 18, 2000), <http://earthobservatory.nasa.gov/Features/Arrhenius/> (narrating that Arrhenius was awarded the Nobel Prize for chemistry in 1903 for his work on the electrolytic theory of dissociation).

113. *See* Spencer Weart, *The Discovery of Global Warming [Excerpt]*, SCIENTIFIC AMERICAN (Aug. 17, 2012), <https://www.scientificamerican.com/article/discovery-of-global-warming/> (noting that in 1896, Svante Arrhenius published a new idea which contributed to basics of interaction between greenhouse gas effect and the climate); *see also* Lee, *supra* note 109 (summarizing Arrhenius investigation of the effect of doubling atmospheric carbon-dioxide on global climate); *see generally* Ian Sample, *The Father of Climate Change*, GUARDIAN (Jun. 30, 2005), <https://www.theguardian.com/environment/2005/jun/30/climatechange>. climatechangeenvironment2 (explaining Arrhenius’ contribution to the basic science of climate change).

114. *See* Sample, *supra* note 113 (noting that Arrhenius starting point in doing what he described as “tedious calculation” was a set of readings taken by Samuel Langley, who had tried to work out how much heat the earth received from the full moon).

115. *See* Lee, *supra* note 109 (pointing out that Arrhenius incorporated the ideas of Arvid Hogbom in arriving at his hypothesis).

heated the atmosphere.<sup>116</sup>

By far the most empirical and distinctive is the 1938 work of Guy Stewart Callendar. There is irony in the fact that Callendar who was not an expert on climate related science, but a British engineer specializing in steam technology should have mostly painted a picture of greenhouse gas theory; and explained how human activities contribute to climate change.<sup>117</sup> No other scholar approached the combination of archival mastery and intellectual passion that Callendar has brought to the question of 'casual connection' between anthropogenic gas emission and climate system.

Having noticed an increase in temperature of about 10% in 100 years from the 19<sup>th</sup> century onward in United States and North Atlantic region, Callendar researched on anthropogenic carbon dioxide levels and their impacts on temperature.<sup>118</sup> He thereafter summed it up that human activities enhance higher levels of CO<sub>2</sub>. Callendar did not conceal his observation on the consequences of man-made gas emission. Therefore, he warned that greenhouse warming was looming. In turn, Callendar's warming provoked<sup>119</sup> Physicist Gilbert Plass in 1956 when he confirmed that adding CO<sub>2</sub> to the atmosphere would increase infrared radiation absorbed;<sup>120</sup> stressing further that industrialization would raise the earth's temperature per century.<sup>121</sup>

The cumulative power of Callendar's account of anthropogenic impact of carbon dioxide on climate system and its sequels, taken

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116. See Graham, *supra* note 112 (quoting Svante Arrhenius asking an important question "[i]s the mean temperature of the ground in any way influenced by the presence of the heat-absorbing gases in the atmosphere?").

117. See Sample, *supra* note 113 (noting that Callendar was an expert on steam technology and that he apparently took up meteorology as a hobby to fill his spare time).

118. See *id.* (asserting that the increase in gas would raise the heat in the atmosphere because the CO<sub>2</sub> in the atmosphere did absorb all the heat radiation).

119. See *id.* (noting that this provocation was a consequence of the second world war and the cold war which brought a new urgency to many fields of research).

120. See Gilbert N. Plass, *Infrared Radiation in the Atmosphere*, 24 AM. J. PHYSICS 303, 321 (1956) (calculating the transmission of radiation through the atmosphere and narrowing down the likelihood that adding more CO<sub>2</sub> would increase the interference with infrared radiation).

121. See Graham, *supra* note 112 (emphasizing that if man-made emissions would confine at the current (1950s) rate, the average global temperature at the rate of 1.1 degree Celsius per century should be expected).

together, hammered home human activities as the likely cause of the rapid increase in global average temperature over the past several decades. But its very effect on climate change raises a number of questions. The most explicit is the human rights violations of anthropogenic gas emission.

#### B. IDENTIFYING THE HUMAN RIGHTS VIOLATION OF GAS EMISSION

The fulfillment of most fundamental human needs is dependent on many elements of the climate: air to breathe, water to drink, food to eat, and shelter for protection. Greenhouse gas (GHG) emissions from anthropogenic sources, primarily fossil fuel use, causes an increase in the Earth's average temperature, which in turn threatens these fundamental needs. Few years ago, the Inter-Governmental Panel on Climate Change (IPCC) identified certain phenomena as threatening the enjoyment of human rights. These phenomena include the increasing frequency of extreme weather events and natural disasters, spread of tropical and vector borne diseases, droughts, water shortages, rising sea levels, heat waves, etc.<sup>122</sup>

Moreover, the UN Human Rights Council has also affirmed that most at risk are the rights of already vulnerable peoples, such as indigenous peoples, minorities, women, children, the elderly persons with disabilities and other groups especially dependent on the physical environment.<sup>123</sup> In Nigeria the minority group of Niger-Delta is most vulnerable to the adverse effect of anthropogenic gas induced climate change. As stated in *Gbemre*, the continuing flare of gas by Shell, B.P., and other oil industries in the Iwherekkan community of the Niger-Delta with eventual warming of the climate system has a far-reaching implication on the minority environment of Niger-Delta and the lives of the inhabitants.<sup>124</sup> Expectedly, the Benin

122. See *Human Rights and Climate Change*, OHCHR, [www2.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRCClimateChangeIndex.aspx](http://www2.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRCClimateChangeIndex.aspx) (reinforcing the 5<sup>th</sup> Assessment Report of the Intergovernmental Panel on Climate Change).

123. See *Council Discusses Measures That Can Be Adopted by States in Addressing the Effects of Climate change on Human Rights*, OHCHR BLOG (March 6, 2015), [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15658&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15658&LangID=E) (discussing that the damaging consequences of climate change were being increasingly felt by these vulnerable groups).

124. See *Gbemre v. Shell Petroleum Development Company Nigeria Limited*

Federal High Court declared this flaring activity as a gross violation of fundamental rights to life (including healthy environment) and dignity of human person.<sup>125</sup>

On the contrary, some advocates of the right to fossil-fuel economic development have argued that poorer countries need to develop as the rich countries have, even if it may raise emissions for a particular period, after which they could converge their efforts to reduce emissions together with the developed countries.<sup>126</sup> It seems inequitable to subscribe to the idea of a development model based on fossil-fuels. As argued by Marcos Orellana, there is simply no more space in the atmosphere to increase emissions without further damaging the climate system.<sup>127</sup> The United Nations Declaration on the Right to Development notes that the “development process must respect all human rights and fundamental freedoms and contribute to the realization of rights for all.”<sup>128</sup> In fact, the linkages between anthropogenic gas-induced climate change and human rights are thus beyond dispute.

## VI. THE IMPOSED LEGAL ORDER AND THE RHETORIC OF THE NETHERLANDS COURT DECISION IN NIGERIA

The 2015 Netherlands court decision<sup>129</sup> concerning the protection

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and Others [2005] 1 AHRLR 151 (Nigeria).

125. *Id.* (noting that fundamental rights to life and dignity of person are guaranteed by sections 33(1) and 34(1) of the constitution of the federal republic of Nigeria, 1999 and Articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9 vol. 1, Laws of Federation of Nigeria, 2004).

126. See Siddhartha Dabhi, *The 'third way' for climate action*, 12 EPHEMERA 242, 242-48 (2012), <http://www.ephemerajournal.org/sites/default/files/12-1dabhi.pdf> (quoting Anthony Godolens that only the industrial countries should be required to focus more on emission reduction and focus less on development).

127. See Marcos A. Orellana, *Climate Change and the Millennium Development Goals: The Right to Development, International Cooperation and the Clean Development Mechanism*, 7 INT'L J. HUM. RTS. 12, 145-70 (2003).

128. *Id.* at 147-48.

129. See RBDHA 24 juni 2015, RvdW 2015, HA ZA 13-1396 m.nt. (Urgenda Foundation/The Netherlands) (Neth.) (compelling the Dutch government to reduce CO<sub>2</sub> emission by a minimum of 25% by 2020 to fulfill its obligation to protect and improve the living environment against the imminent danger caused by climate change).

of the climate system established a remarkable role for judges in forcing the sovereign states to assume the responsibility of protecting their citizens against the effects of climate change with the Urgenda<sup>130</sup> case, in which 886 Dutch citizens sued their government for the adoption of more stringent climate policies. In the first successful case of its kind, the District Court of Hague has ruled that the Dutch government's stance on climate change is illegal and has ordered them to take action to cut greenhouse gas emission by a hefty 25% within five years.<sup>131</sup>

As stated in the Introduction, the tenor of the Niger-Delta's Gbemre<sup>132</sup> case was very similar to the Urgenda case. Not only did the court recognize gas flaring as a 'gross violation' of the constitutionally guaranteed rights to life and dignity; the court went ahead and ordered for the immediate steps to stop the further flaring of gas in Iwerhekan community.<sup>133</sup> While it was an important outcome, the Shell Oil Company and the government bet on the nature of the imposed legal order.<sup>134</sup>

To restate, the Nigerian legal order is the dominant legacy of British colonial rule.<sup>135</sup> Looking through its legal system, as a common law jurisdiction, Nigeria has highly specific and prescriptive laws. As such, the judiciary is required to interpret statutes narrowly; a stark contrast to the widening approach that Netherlands courts take to interpretation. Under the private law of the Netherlands, as a civil law jurisdiction, law is formulated as general principles which are assumed to regulate all practical situations.<sup>136</sup> This gives The Netherlands court a wide discretion to apply the law as it saw fit in reaching the verdict in Urgenda.

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130. See *id.* ¶13-1396 (noting that Urgenda, a contraction of 'urgent' and 'agenda,' is a foundation that strives for sustainable development within the Netherlands).

131. *Id.*

132. See *Gbemre v. Shell Petroleum*, 1 AHRLR 151, ¶5.

133. *Id.*

134. *Id.*

135. See Bassey, *supra* note 43.

136. See Mathew Soar, *Would the Urgenda Case fly in New Zealand?*, DECONSTRUCTING PARIS (Oct. 1, 2015), [paristext2015.com/2015/10/would-the-urgenda-case-fly-in-new-zealand](http://paristext2015.com/2015/10/would-the-urgenda-case-fly-in-new-zealand) (showing how different jurisdictions have entirely differently legal and constitutional relationships to international law, and thus the international climate change regime).

Nigeria adopts a dualist approach to its international obligations.<sup>137</sup> In fact, compliance with international law requires its incorporation into the constitution.<sup>138</sup> In its origin, international law was exclusively concerned with the international public realm of states.<sup>139</sup> This explains why Nigerian legal order does not have detailed rules concerning its relationship with international law.<sup>140</sup> But in The Netherlands, there exists a differing perception regarding relationship between international law and domestic law. Also by contrast, The Dutch legal system is one of the monist approaches to International law.<sup>141</sup> Upon ratification, international treaty is automatically incorporated into domestic Dutch law.<sup>142</sup> Also international obligations are also used as a means of interpreting domestic law. Besides, the system of judicial precedents, in which the Nigeria Supreme Court decisions are regarded as binding in judicial proceedings,<sup>143</sup> has stultified the development of legal thought.

Together all of this suggests that the Nigeria state responsibility to protect its populations against climate change is under considerable pressure. Unfortunately, if Nigeria is faced with the equivalent Urgenda case like that of *Gbemre*,<sup>144</sup> a Nigerian court would not reach the same some striking similarities. The Dutch Constitution and that of the Nigeria have a similar level of influence; both jurisdictions have similar international obligations under the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and international custom. Furthermore, both judiciaries see themselves, to an extent, as protectorates of human rights and a check on state power. However, the Nigerian court has really shown the desire to re-jig the imposed British legal order in

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137. CONSTITUTION OF NIGERIA (1999), § 12(1).

138. 1999 Constitution of the Federal Republic of Nigeria [1999], at § 12.

139. The Application of International Law in Domestic Courts, THE LAWYERS CHRONICLE available at [www.thelawyerschronicle.com/the-application-of-international-law-in-domestic-courts/](http://www.thelawyerschronicle.com/the-application-of-international-law-in-domestic-courts/).

140. GW. [Constitution] art. 93.

141. See Soar, *supra* note 136; see also, Alkena E.A, International Law in Domestic Systems, 14 ELECTRON J. COMP. LAW I (2010) ([T]he Netherlands System has been qualified as “moderately monistic”).

142. Henry Schermers, Netherlands, in 7 THE EFFECT OF TREATIES IN DOMESTIC LAW 109 (Francis Jacobs and Shelly Roberts eds., 1987).

143. CONSTITUTION OF NIGERIA, §§ 6(6)(b) & 323.

144. See *Gbemre v. Shell Petroleum*, 1 AHRLR 151, ¶5.

*Gbemre*<sup>145</sup> by declaring the gas flaring law to be unconstitutionally null and void. Nonetheless, the court's refusal to recognize the duty of care established in 'negligence' in relation to the responsibility of Nigerian government to cut greenhouse gas emissions is a pointer to the fact that the re-jigging attempt of the court holds no water.

## VII.CONCLUSION

By examining how the idea of sovereignty was changed overtime, and various different attempts towards justifying the same, this Article has emphasized that Sovereign States rights are not absolute, rather they depend on a series of responsibilities as well as privileges; and a failure to uphold such responsibilities will lead to external intervention on the grounds of the international community.<sup>146</sup> In as much as climate change impedes the enjoyment of human rights, the Western ethics of deontology is adopted to construe climate protection as sovereign states' responsibility.<sup>147</sup> More so, in the light of the key paradox that has originated as a form of resistance and rebellion to the construction of sovereign states' responsibility to protect their populations against climate change, the human rights violation of GHG emissions is briefly weighed side-by-side with the right of fossil-fuel economic development.<sup>148</sup> Nevertheless, the Federal Republic of Nigeria, as a sovereign state, has failed to put an end to Germiston— specifically gas flaring. As a party to the United Nations Framework Convention on Climate Change (UNFCCC), Nigeria has, through its national pledge<sup>149</sup> agreed to take climate change consideration into account. Next, critical questions can be asked about the failure of Nigerian legal order in championing the cause of climate justice. It is striking to note that the Nigerian legal order is merely an oppressive British colonial construct which is an amalgam of divergent legal principles.<sup>150</sup>

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145. *See id.*

146. *See Glanville, supra* note 53, at 1-32.

147. *See id.*

148. *See Dabhi, supra* note 126 at 242-48; *see also Orellana, supra* note 127, at 145-70.

149. *See Orellana, supra* note 127, at 145-70.

150. *See Femi Adesina, Nigeria submits Intended Nationally Determined Contributions (INDC) To Address Climate Change to UN*, NTA (Nov. 30, 2015), <http://www.nta.ng/news/20151130-nigeria-submits-intended-nationally->



Therefore, it does not seem very wise to fetish such an imposed legal order as the presumed legal order for a quick redress of human rights violations of climate change. However, a re-jigging of this imposed legal order through adaptations to equitable circumstances, which suggests social justice system based on imaginative and innovative legal engineering,<sup>151</sup> is thus necessary for the courts in Nigeria to set policy that will hold the government responsible for the human rights violations of greenhouse gas emissions. In achieving this end, there should be a factual study of legal administration, social administration, social investigations as preliminaries<sup>152</sup> to the promulgation of climate and zero gas emission legislations.

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determined-contributions-indc-to-address-climate-change-to-un/ (disseminating the news that the Nigerian policy to address climate change, as exposed in the country's INDC submitted to the UNFCCC on November 28, 2015, commits to 20 percent unconditional and 45 percent conditional Greenhouse Gases (GHGs) emission reduction post 2020).

151. *Id.* at note 102.

152. *See id.* at note 22 (recommending that the re-jigging of the imposed British legal order requires effective discharges of the roles of both the professionals in legal profession and the legislature).